

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

NATIONWIDE GENERAL)	
INSURANCE COMPANY, as)	
Subrogee of Gloria Dennis,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 05C-12-008-FSS
)	
THE HERTZ CORPORATION,)	
)	
Defendant.)	

Submitted: June 9, 2006
Decided: September 18, 2006

MEMORANDUM OPINION AND ORDER

Upon Defendant's Motion for Summary Judgment – *DENIED*

Christopher J. Sipe, Esquire, P.O. Box 8092, Newark, Delaware, 19714. Attorney for Plaintiff.

Stephen F. Dryden, Esquire, Robinson Grayson & Dryden, 910 Foulk Road, Suite 200, Wilmington, Delaware, 19803. Attorney for Defendant.

SILVERMAN, J.

This is yet another case of first impression concerning Delaware's no-fault automobile insurance law. Plaintiff made personal injury protection payments to its insured and now seeks reimbursement from Defendant, tortfeasor's insurer, through this subrogation action. The question presented is whether the three year statute of limitations began to run upon Plaintiff's first or final PIP payment.

I.

On March 20, 2002, Gloria Dennis was rear-ended and injured by Janet Pearson. Dennis was insured by Plaintiff, Nationwide General Insurance Company. Pearson was insured by Defendant, The Hertz Corporation. Dennis was compensated by Nationwide for her injuries through PIP payments. The first payment was on April 29, 2002, and the last was on July 6, 2004. As a result, Nationwide is subrogated to Dennis's legal rights concerning the automobile accident. Plaintiff filed this subrogation action on October 11, 2005, which was more than three years from the first PIP payment, but less than three years from the final payment. Defendant has moved for summary judgment, relying on the undisputed facts and the statute of limitations.

II.

Defendant's main authority is *MVAIC v. Aetna*, a New York case which holds, because New York's insurance law is unclear, the three year statute of

limitations runs from the initial PIP payment.¹ Defendant further argues that *Mergenthaler v. Asbestos Corp.*, a Delaware case, is in accord with *MVAIC*'s holding. *MVAIC*, however, is not binding, and *Mergenthaler* simply states that "a cause of action exists when the right to bring suit or when a present right to a remedy exists."² *Mergenthaler* does not address the issue presented here. Defendant also argues that had Plaintiff filed suit within three years of the accident, then the suit would be timely.³ While that is true, it also does not answer the question here. If an earlier filing would have been timely, it does not follow that a later filing is necessarily too late.

III.

Harper v. State Farm is not dispositive, but it is a start. Relying on 10 *Del. C. § 8106*, *Harper* holds that PIP claims under Delaware's no-fault statute are statutory in nature. Therefore, according to *Harper*, the three year statute of limitations applies to PIP insurers' subrogation rights.⁴ *Harper* further holds that a

¹ *Motor Vehicle Accident Indemnification Corp. v. Aetna Casualty and Surety Co.*, 674 N.E.2d 1349, 1353 (N.Y. 1996).

² *Mergenthaler v. Asbestos Corp. of America*, 534 A.2d 272, 276 (Del. Super. Ct. 1987).

³ 10 *Del. C. § 8106* ("[N]o action based on a statute...shall be brought after the expiration of 3 years from the accruing of the cause of such action....").

⁴ *Harper v. State Farm Mutual Automobile Ins. Co.*, 703 A.2d 136, 140 (Del. 1997) ("[T]he PIP carrier's right of subrogation is a statutorily

(continued...)

subrogation action does not accrue and the statute of limitations does not begin to run “until the PIP benefit is paid to or for its insured.”⁵ *Harper* is only a start because neither it nor § 8106 addresses whether the statute of limitations begins to run from the first or last PIP payment. In other words, *Harper* did not decide when “the PIP benefit is paid.”⁶

Because the statute does not speak to the question presented, it is ambiguous, and therefore, statutory construction is necessary. If a statute’s meaning is in doubt, referring to other jurisdictions’ laws concerning the same subject makes sense.⁷ This approach makes especially good sense where, as here, the statute is silent on the point and public policy is implicated. Because several other states have laws directly addressing the question, the court will consider them. There is no reason to believe that Delaware’s legislature would decide contrary to so many other state legislatures.

(...continued)

created cause of action. We have also held that the applicable statute of limitations for that cause of action is the three-year provision in 10 *Del.C.* § 8106.”).

⁵ *Id.* (“We further hold that a cause of action for the PIP insurer’s statutory right of subrogation, against the tortfeasor’s liability insurer, does not accrue until the PIP benefit is paid to or for its insured.”).

⁶ *Id.*

⁷ *See* Singer, Norman J., [Sutherland’s] Statutes and Statutory Construction §52:03 (6th ed. 2000).

The other legislatures that have addressed and codified this matter overwhelmingly decided that the cause of action accrues upon the last PIP payment.⁸ Where a clear weight of authority exists on one side of an issue and where the Delaware General Assembly has not addressed the matter, it follows that were the Assembly to address this question expressly, Delaware's legislature would act consistent with so many other legislatures.

Since most jurisdictions that have codified the issue favor accrual from the last PIP payment, it seems as though the Delaware legislature expects the court to decide the issue consistent with the weight of the other jurisdictions and endorse accrual from the last PIP payment. The court cannot see a reason why Delaware's legislators would see the issue differently from so many other legislatures. While *MVAIC* holds that the cause of action accrues at the first PIP payment,⁹ New York seems to be flying from the flock.

Policy considerations also suggest that the statute of limitations should run from the last PIP payment. One purpose behind Delaware's no-fault statute is to "assure prompt payment to an injured person for medical expenses and basic

⁸ See, e.g., N.J.S.A. § 39:6A-13 ("Every action for the payment of benefits... shall be commenced not later than two years after the injured person,...provided, however, that if benefits had been paid before then an action for further benefits may be commenced not later than two years after the last payment of benefits."). See also K.R.S. § 304.39-230(6); H.R.S. § 431:10C-315.

⁹ *MVAIC*, 674 N.E.2d at 1352.

economic losses arising from automobile accidents, irrespective of fault.”¹⁰ Delaware’s statutory purpose mirrors other jurisdictions’ purposes that have codified a three year statute of limitations from the last PIP payment.¹¹

Another purpose behind Delaware’s no-fault statute is to “remove the expense and uncertainty of automobile accident litigation.”¹² This rationale also points to accrual from the last PIP payment. As Plaintiff correctly asserts, if the accrual date is from the first PIP payment, the court will have to stay subrogation claims while PIP and tort claims are pending. Otherwise, the total claim amount will not be known for the subrogation actions. Therefore, motions to stay, lift the stay and amend would be inevitable, consuming time and money. This also presents case management challenges. On the other hand, if the PIP subrogation litigation starts after the first-party PIP payments are resolved, staying the litigation would be unnecessary since the first-party PIP claim would be fixed and certain. Once filed, subrogation cases should proceed full bore.

¹⁰ *Lomax v. Nationwide Mutual Ins. Co.*, 964 F.2d 1343, 1346 (3d Cir. 1992). *See also Selective Ins. Co. v. Lyons*, 681 A.2d 1021, 1024 (Del. 1996).

¹¹ *See State Farm Mutual Auto. Ins. Co. v. Licensed Beverage Ins. Exch.*, 679 A.2d 620, 622 (N.J. 1996) (“The Legislature’s intent in adopting the act was to provide a means of quickly compensating injured motorists.”); *Flores v. Barretto*, 54 P.3d 441, 444 (Haw. 2002); *State Farm Mutual Auto. Ins. Co. v. Rains*, 715 S.W.2d 232, 235 (Ky. 1986).

¹² *Selective*, 681 A.2d at 1024.

Furthermore, under 21 *Del. C.* § 2118(g)(4), subrogated rights are limited to the tortfeasor's maximum coverage "after the insured party's claim has been settled or otherwise resolved."¹³ Again, this reinforces the three year statute of limitations' running from the last PIP payment, since having this rule allows the no-fault insurer to determine the actual loss before bringing the subrogation action.

Looking more broadly at policy considerations, worker's compensation and no-fault have the same ring, which can be used to draw an analogy. Both are designed to protect injured people, employees in the former and motorists in the latter. The purpose behind Delaware's worker's compensation is to "assure prompt compensation of injured employees without regard to fault and to obviate the need for litigation." This is nearly identical to the purpose behind Delaware's no-fault statute, mentioned above. Specifically addressing worker's compensation, the legislature made it clear that the statute of limitations runs from the last payment. As the statutes' purposes mirror each other, the legislature would likely approach them the same way and conclude that the statute of limitations runs from the last PIP payment.

Finally, although not on point and not controlling, comments in *Harper* suggest that the cause of action accrues from the last PIP payment, e.g. using terms

¹³ 21 *Del. C.* § 2118(g)(1).

such as “benefits” and “payments.”¹⁴ Also, *Harper* relies on and quotes *Chesapeake Utilities Corp.*, which holds that the statute “does not begin to run at the time of the injury,” but rather, “the statute begins to run only when the cause of action for indemnity arises, or the indemnitee's liability is fixed and discharged.”¹⁵ These both suggest that the statute of limitations runs from the last payment, which is when the liability will be fixed and discharged and also when the payments have been made.

Taking all these things into account, the court holds, as a matter of law, that the statute of limitations begins to run upon the final PIP payment. Here, the final PIP payment is dated July 6, 2004. Because Plaintiff filed this case on October 11, 2005, within the three year limitations period, it is timely.

IV.

For the foregoing reasons, Defendant’s motion for summary judgment is ***DENIED***.

IT IS SO ORDERED.

/s/ Fred S. Silverman

Judge

cc: Prothonotary (Civil Division)

¹⁴ *Harper*, 703 A.2d at 141.

¹⁵ *Chesapeake Utilities Corp. v. Chesapeake and Potomac Tel. Co. of Maryland*, 401 A.2d 101, 102 (Del. Super. Ct. 1979).